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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re

COMMUNITY BANCORP,

Debtor.

YVETTE WEINSTEIN, CHAPTER 7  
TRUSTEE OF COMMUNITY  
BANCORP,

Plaintiff,

v.

PROGRESSIVE CASUALTY  
INSURANCE COMPANY, ET AL.,

Defendants.

Case No. BK-S-10-20038-LED

Chapter 7

Adversary Proceeding No. 13-01168-led

**DEFENDANT PROGRESSIVE  
CASUALTY INSURANCE  
COMPANY'S MOTION TO DISMISS  
OR STAY ADVERSARY  
PROCEEDING AND MEMORANDUM  
IN SUPPORT**

**Date: December 16, 2013**

**Time: 1:30 p.m.**

1 NOW COMES Defendant, Progressive Casualty Insurance Company (“Progressive”),  
2 by and through its undersigned counsel, and respectfully requests that this Court enter an  
3 order dismissing without prejudice this Adversary Proceeding filed by Yvette Weinstein,  
4 Chapter 7 Trustee of Community Bancorp (“Trustee”), or, in the alternative, staying the  
5 Adversary Proceeding until such time as Progressive’s appeal of the Court’s September 6,  
6 2013 order in the *In re Community Bancorp* bankruptcy proceeding (the “Bankruptcy  
7 Proceeding”) [DE 398] has been resolved.

### 8 **INTRODUCTION**

9 Progressive brings this motion in the interest of judicial economy. The issue whether  
10 the D&O liability insurance policy Progressive issued to Community Bank of Arizona  
11 (“CBOA” or the “Bank”) provides coverage for a claim by the FDIC as receiver of the Bank  
12 against the Bank’s former directors and officers (the “Ds & Os”) is now the subject of two  
13 pending actions. The first is the declaratory judgment action Progressive filed in the U.S.  
14 District Court for the District of Arizona in February. The second is this Adversary  
15 Proceeding the Trustee filed some seven months later. While it is clear that this issue will be  
16 adjudicated, it remains to be resolved whether that adjudication will take place in the Arizona  
17 District Court or this Court.

18 In its September 6, 2013 order in the Bankruptcy Proceeding, this Court held that  
19 Progressive’s declaratory judgment action constituted a “technical violation” of the automatic  
20 bankruptcy stay. That issue presently is before the Bankruptcy Appellate Panel for the Ninth  
21 Circuit (“BAP”) pursuant to Progressive’s appeal of the Court’s September 6 order. The  
22 Arizona District Court has stayed the declaratory judgment action pending resolution of  
23 Progressive’s appeal.

24 In order to avoid irreparable harm to the defendants and for the sake of efficiency and  
25 judicial economy Progressive respectfully submits that this Court should do the same with

respect to this Adversary Proceeding. Absent such relief, there is a very real possibility that the parties, and the Court, will be subject to significant and unnecessary burden and expense in addressing issues in this matter that may ultimately be resolved in the Arizona District Court.

### **BACKGROUND**

On or about July 13, 2012, the Federal Deposit Insurance Corporation, as Receiver of Community Bank of Arizona (“FDIC-R”), filed a lawsuit (the “FDIC-R Action”) against the former directors and officers of CBOA who are named as defendants in this Adversary Proceeding. The FDIC-R Action is pending in the United States District Court for the District of Arizona and is captioned *FDIC-R v. Jamison, et al.*, No. 2:12-cv-01508. On February 4, 2013, Progressive filed an action, also in the United States District Court for the District of Arizona, seeking a declaratory judgment that Directors & Officers / Company Liability Insurance Policy for Financial Institutions No. 4548839-08 that it issued to, *inter alia*, CBOA (the “Progressive Policy” or the “Policy”) does not provide coverage for the FDIC-R Action.<sup>1</sup>

#### **I. The Trustee’s Motion to Determine Violation of the Automatic Stay**

Shortly after Progressive filed the CBOA DJ Action, counsel for the Trustee contacted counsel for Progressive and questioned whether it violated the automatic bankruptcy stay.<sup>2</sup> In response to this inquiry, Progressive’s counsel directed the Trustee’s counsel to the Ninth Circuit’s decision in *In re Pintlar Corp.*, 124 F.3d 1310 (1997), and

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<sup>1</sup> Progressive’s declaratory judgment action is captioned *Progressive Casualty Insurance Company v. Federal Deposit Insurance Corporation, as Receiver of Community Bank of Arizona, et al.*, No. 2:12-cv-00232-HRH (D. Ariz.) (the “CBOA DJ Action”).

<sup>2</sup> (Bankruptcy Proceeding, DE 382, Declaration of Matthew J. Dendinger in Support of Opposition of Progressive Casualty Insurance Company to Motion to Determine Violation of the Automatic Stay (“Dendinger Dec.”), ¶ 8; Ex. D).

1 noted that it directly addressed this issue.<sup>3</sup> *Pintlar* held that a declaratory judgment action  
2 such as the CBOA DJ Action does not come within the scope of the Bankruptcy Code's stay  
3 provision. Notwithstanding an invitation by Progressive's counsel to contact him if she had  
4 any further questions, neither he nor Progressive heard anything further from the Trustee's  
5 counsel. Some four months later, with no further communication to Progressive or its  
6 counsel in advance, the Trustee filed a motion in the Bankruptcy Proceeding on July 12,  
7 2013 asserting that, contrary to *Pintlar*, this action does violate the automatic stay. On  
8 August 27, 2013, the Bankruptcy Court held a hearing during which it announced its decision  
9 concerning the Trustee's motion. The Court's September 6, 2013 order holding that the  
10 CBOA DJ Action constitutes a "technical violation" of the automatic stay followed.

11 On September 20, 2013, Progressive filed a Notice of Appeal of the Court's  
12 September 6 order. Pursuant to the Briefing Order issued by the BAP, Progressive's opening  
13 brief and appendix are due by November 12, 2013, the Trustee's response brief and appendix  
14 are due within 21 days after service of Progressive's opening brief, and Progressive's reply  
15 brief is due within 14 days after service of the Trustee's response. Under this schedule,  
16 briefing on Progressive's appeal should be concluded by no later than December 23, 2013.  
17 The Briefing Order further provides that "[t]he parties generally should expect that oral  
18 argument will occur shortly after briefing is completed" and that "the BAP seeks to set  
19 argument as soon as practical after briefing is completed." The first dates subsequent to  
20 December 23, 2013 on which the BAP is hearing oral arguments are January 22, 23 and 24,  
21 2014.

## 22 **II. The CBOA DJ Action**

23 After the Trustee filed her Motion to Determine Violation of the Automatic Stay, the  
24 court in the CBOA DJ Action entered an order on July 29, 2013 that the CBOA DJ Action

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25 <sup>3</sup> (*Id.*).

would be stayed pending the outcome of the Trustee's motion.<sup>4</sup> On September 13, 2013, after the Court entered its order on the Trustee's motion, the court in the CBOA DJ Action entered an order to show cause "why some or all parties in this declaratory judgment action should not be dismissed without prejudice."<sup>5</sup> Progressive responded to that order on September 27, 2013,<sup>6</sup> and the court entered a further order on October 2, 2013.<sup>7</sup> In consideration of Progressive's response, the court *did not* dismiss the CBOA DJ Action but, rather, expressed its view that the action "should be stayed pending the ruling of the [BAP]."<sup>8</sup> Thereafter, on October 15, 2013, the court entered an order staying the CBOA DJ Action pending resolution of Progressive's appeal by the BAP.<sup>9</sup> If Progressive prevails in its appeal, the CBOA DJ Action will proceed. In that instance, Progressive would seek to have the Adversary Proceeding dismissed, if it has not already been.

### **ARGUMENT**

It is clear that the question of whether the Progressive Policy provides coverage for the FDIC-R's claims against the former CBOA Ds & Os ultimately will be adjudicated. Still unsettled, though, is whether that question will be adjudicated in this Court in the recently-filed Adversary Proceeding or by the District Court in Arizona in the CBOA DJ Action Progressive filed nearly a year ago.<sup>10</sup>

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<sup>4</sup> (CBOA DJ Action, DE 52).

<sup>5</sup> (*Id.*, DE 54).

<sup>6</sup> (*Id.*, DE 55).

<sup>7</sup> (*Id.*, DE 56).

<sup>8</sup> (*Id.*).

<sup>9</sup> (*Id.*, DE 57).

<sup>10</sup> Progressive believes Arizona is the proper forum for this dispute. All but one of the Ds & Os reside in Arizona. The FDIC receivership is of a bank that was located in Arizona, and the FDIC-R's underlying action against the Ds & Os is pending in the U.S. District Court in Arizona. The only connection to Nevada is the happenstance that CBOA's bank holding company at the time it failed, Community Bancorp, was headquartered there.

1 Progressive has filed the necessary appeal to obtain further review of the issue  
2 whether the stay applies to the CBOA DJ Action in the first instance and, by extension,  
3 whether the coverage issues are properly addressed in this Court or in the Arizona District  
4 Court. If the Court's order ultimately is affirmed, absent relief from the stay (discussed  
5 below), the CBOA DJ Action likely will not proceed, and the issue of coverage may be  
6 resolved in the context of the Adversary Proceeding. However, if the Court's order is  
7 reversed, as Progressive respectfully believes it should be, the CBOA DJ Action will  
8 proceed, and the issue of coverage will be resolved there. By granting the instant motion for  
9 dismissal or a stay of the Adversary Proceeding until the path forward is clear, the Court can  
10 avoid the possibility that it and the parties will spend significant time and resources litigating  
11 issues in this Court that ultimately may be resolved in the Arizona District Court.

12 Alternatively, this Court could enter an order in the Bankruptcy Proceeding granting  
13 relief from the automatic stay, to the extent it applies, to allow the CBOA DJ Action to  
14 proceed. Progressive intends to file a motion seeking such relief shortly.<sup>11</sup> If granted by the  
15 Court, such relief may obviate the need for Progressive to continue pursuing its appeal of the  
16 Court's September 6 order.<sup>12</sup>

17 Courts have recognized that a stay of proceedings is in the interests of judicial  
18 economy when a pending appeal could materially affect whether or how they will proceed.  
19 For example, in *New Cingular Servs. v. Burkart*, No. 2:07-cv-02451-MCE, 2008 U.S. Dist.  
20 LEXIS 58563 (E.D. Cal. Aug. 1, 2008), a creditor in a bankruptcy adversary proceeding  
21 initiated by the trustee filed a motion to compel arbitration. *Id.* at \*3. The bankruptcy court  
22 denied the motion, and the creditor appealed to the district court. *Id.* at \*4–5. The creditor  
23

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24 <sup>11</sup> The Trustee has declined to agree to this relief.

25 <sup>12</sup> It remains Progressive's position that, pursuant to the Ninth Circuit's decision in *Pintlar*,  
the automatic stay is inapplicable to the CBOA DJ Action.

1 also filed a motion in the bankruptcy court asking that the adversary proceeding be stayed  
2 pending resolution of its appeal. *Id.* at \*4. The bankruptcy court denied that motion, and the  
3 district court reversed. *Id.* at \*2, 4.

4 After first setting forth the “[f]actors a court must consider when determining whether  
5 to issue a stay pending appeal,” the district court concluded that those factors weighed in  
6 favor of granting the requested stay. *Id.* at \*5–17. The factors set forth by the court were  
7 ““(1) whether the stay applicant has made a strong showing that he is likely to succeed on the  
8 merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether  
9 issuance of the stay will substantially injure the other parties interested in the proceeding; and  
10 (4) where the public interest lies.”” *Id.* at \*5 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776  
11 (1987)). The court went on to state that “[e]ssentially, the party seeking the stay must  
12 demonstrate that the injury it would sustain if the stay did not issue outweighs the harm the  
13 stay would cause the party opposing the stay” and that “[w]here the moving party has  
14 established irreparable harm to the movant, absence of harm to the opposing party, and lack  
15 of injury to the public interest, the ‘likelihood of success’ requirement is relaxed somewhat.”  
16 *Id.* (citations omitted).

17 As is the case here, the court in *New Cingular* determined that the creditor “would  
18 suffer ‘substantial harm’ through potentially unnecessary litigation in the adversary  
19 proceeding if this Court reverses the bankruptcy court’s decision to deny [the creditor’s]  
20 Motion to Compel Arbitration.” *Id.* at \*8. Absent a dismissal or stay of the Adversary  
21 Proceeding pending Progressive’s appeal of the Court’s September 6 order, Progressive and  
22 the other defendants in this action could suffer “substantial harm” through potentially  
23 unnecessary litigation in this Adversary Proceeding if the BAP reverses the Court’s  
24 September 6 order and the CBOA DJ Action proceeds. As noted above, the individual D&O  
25

1 defendants in this proceeding agree that it should be dismissed or stayed pending resolution  
2 of Progressive's appeal.

3 With respect to the merit of Progressive's appeal, Progressive believes there is a high  
4 likelihood that its appeal will be successful. Progressive believes the Court erred in declining  
5 to follow prior Ninth Circuit precedent set forth in *In re Pintlar Corp.*, 124 F.3d 1310 (1997),  
6 and in adopting the Trustee's attempts to distinguish *Pintlar* based on immaterial factual  
7 differences between *Pintlar* and this matter. Finally, as the court held in *New Cingular*,  
8 "[g]ranteeing the Motion to Stay Pending Appeal is in the public interest" because "[s]taying a  
9 potentially unnecessary adversary action in a bankruptcy court conserves judicial resources."  
10 2008 U.S. Dist. LEXIS 58563, at \* 16; *see also, e.g., Bank of America, N.A. v. Landis*, No.  
11 2:11-cv-1338-RCJ-PAL, 2011 WL 5117909, at \*2 (D. Nev. Oct. 27, 2011) (granting motion  
12 to stay pending appeal); *Abudiab v. City & County of San Francisco*, No. C 09-01778 JSW,  
13 2012 U.S. Dist. LEXIS 47962, at \*1-2 (N.D. Cal. Apr. 4, 2012) (staying proceeding pending  
14 resolution of interlocutory appeal "in the interests of judicial economy"); *Bristow v.*  
15 *Lycoming Engines*, No. CIV. S-06-1947 LKK/GGH, 2008 U.S. Dist. LEXIS 50416, at \*8  
16 (staying proceeding pending appeal of order decertifying class); *Balvage v. Ryderwood*  
17 *Improvement & Serv. Ass'n, Inc.*, No. C09-5409BHS, 2010 U.S. Dist. LEXIS 98776, at \*2, 6  
18 (W.D. Wash. Sept. 1, 2010) (staying action pending discretionary, interlocutory appeal);  
19 *Stadler v. McCulloch*, 882 F. Supp. 1524, 1527-28 (E.D. Pa. 1995) (noting that in  
20 considering a motion to stay, "[c]ourts must consider the time and effort of counsel and the  
21 litigants with a view toward a policy of avoiding piecemeal litigation" and granting the  
22 motion to stay pending appeal (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).  
23 Progressive respectfully suggests that the Court should follow the reasoning of these cases in  
24 this matter and dismiss or stay the Adversary Proceeding pending resolution of Progressive's  
25 appeal of the Court's September 6 order.

**CONCLUSION**

For all the foregoing reasons, Progressive respectfully requests that the Court enter an order dismissing this matter with prejudice or, in the alternative, staying this matter pending final resolution of Progressive's appeal of the Court's September 6, 2013 order and for such other and further relief as the Court deems just and proper.

Dated this 7th day of November, 2013.

Respectfully submitted by,

/s/ Brian E. Holthus

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*Counsel for Progressive Casualty Insurance  
Company*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on November 7, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the Court's CM/ECF system, which will send notification of such filing to all counsel of record, including the appellee.

/s/ Agnes R. Wong